Supreme Court, U.S.
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No. 96-374

In The

Supreme Court of the United States

October Term, 1996

SCHNEIDER NATIONAL CARRIERS, INC.
AND HENRY LAVERNE WUBBEN,

Petitioners,

vs.

RICHARD PYATT AND DIANA PYATT,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF

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I. TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
FURTHER REASONS FOR GRANTING THE WRIT	1
SUMMARY	6

II. TABLE OF AUTHORITIES

Page(s)

CASES

Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983) 3

Allison v. Ticor Title Ins. Co., 979 F.2d 1187 (7th Cir. 1992) 4

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 4

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) 5

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 4

Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986) 3

Davlan v. Otis Elevator Co., 816 F.2d 287 (7th Cir. 1987) 3

Desnick v. ABC, Inc., 44 F.3d 1345 (7th Cir. 1995) 5

Erie R. Co. v. Thompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 1, 5

Galard v. Johnson, 504 F.2d 1198 (7th Cir. 1974) 3

Gasperini v. Center for Humanties, Inc., ___ U.S. ___, 116 S.Ct. 2211, 135 L.Ed. 659 (1996) 1, 2

Geldermann, Inc. v. Financial Management Consultants, Inc., 27 F.3d 307 (7th Cir. 1994) 5

Gruca v. Alpha Therapeutic Corp., 51 F.3d 638 (7th Cir. 1995) 5

Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) 2

Hiatt v. Rockwell International, 26 F.3d 761 (7th Cir. 1994) 5

II. TABLE OF AUTHORITIES – Continued

Page(s)

Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979) 3

Jackson v. Bunge Corp., 40 F.3d 239 (7th Cir. 1994) 5

Mayer v. Gary Partners & Co., 29 F.3d 330 (7th Cir. 1994) 4, 5

Mercado v. Ahmed & Checker Taxi Co., 974 F.2d 863 (7th Cir. 1992) 3

Oberman v. Dun & Bradstreet, Inc., 507 F.2d 349 (7th Cir. 1974) 2

Pedrick v. Peoria & E. R. Co., 37 Ill. 2d 494, 229 N.E.2d 504 (1967) 3

Robison v. Lescrenier, 721 F.2d 1101 (7th Cir. 1983) 3

Ross v. Black & Decker, Inc., 977 F.2d 1178 (7th Cir. 1992) 4

Sokol Crystal Prods. v. DSC Communications, 15 F.3d 1427 (7th Cir. 1994) 5

Suzek v. Sea-Land Corp., 89 F.3d 345 (7th Cir. 1996) 5

Wassell v. Adams, 865 F.2d 849 (7th Cir. 1989) 3

Other Authorities

Steven A. Childress, *Review of Jury Verdicts in Diversity Cases: An Erie Update*, 4 Nat'l Italian Am. Bar Ass'n J. 39 (1996) 6

STATEMENT OF THE CASE

The basic facts in this appeal are not in dispute. Because Dr. George Schoedinger, III's deposition testimony was read to the jury, there is no issue of credibility. Appellants ask the Court to accept these facts and then determine whether they justify the conclusion in law reached by the trial and appellate courts that the evidence was sufficient to submit the case to a jury. But under what standard of review should this issue be evaluated and resolved? Over Appellants' objection, the district court and the Seventh Circuit applied a "federal reasonable man standard" instead of the Illinois state standard of review which we contend is constitutionally required. *Erie Railroad Company v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). On this basis, Appellants ask this Court to grant Certiorari.

FURTHER REASONS FOR GRANTING THE WRIT

In *Gasperini v. Center for Humanities, Inc.*, ___ U.S. ___, 116 S.Ct. 2211, 135 L.Ed. 659 (1996), Justice Ginsberg, for the majority, held that the New York statutory standard of review to measure the alleged excessiveness of a jury's verdict ("deviates materially") must be applied by the district court in a diversity action for damages under New York state law. The opinion states that, "In light of *Erie*'s doctrine, the federal appellate court must be guided by the damage control standard state law supplies." *Gasperini*, 116 S.Ct. at 2228. In remanding the case, Justice Ginsberg commented that "It does not appear that the district court checked the jury's verdict against the

relevant New York decisions demanding more than "industry standard" testimony to support an award the size the jury returned in this case." *Id.* at 2228. Justice Stevens agreed with the majority on the application of a state standard of review under Rule 59 and with conclusion that such review did not violate the re-examination clause of the Seventh Amendment, but would have affirmed the Second Circuit Court of Appeals' reduction of the damage award. *Id.* at 2225-2226.

Justice Scalia, on behalf of Justice Renquist and Justice Thomas, apparently would have affirmed the trial court decision. The minority state that the majority has committed "the classic *Erie* mistake of regarding whatever changes the outcome as substantive." *Id.* at 2238. The minority would have rejected the state standard of review as a matter of procedure. *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

Like *Gasperini,* the district court in the instant case did not consider the applicable state standard of review. Appellants suggest that *Gasperini* is an important case in the consideration of this Petition which seeks review under Rule 50 of the Federal Rules of Civil Procedure.

The Seventh Circuit's About Face

For over thirty years the Seventh Circuit expressly followed a state standard of review for sufficiency of the evidence. *Oberman v. Dun & Bradstreet, Inc.,* 507 F.2d 349 (7th Cir. 1974). Contrary to Respondent's contention, in 1967 the Illinois Supreme Court, after extensive review of the standards that were then in use in other states, expressly rejected a "reasonableness test" for a more

objective review standard. *Pedrick v. Peoria & E. R. Co.*, 37 Ill. 2d 494, 229 N.E.2d 504 (1967). "[V]erdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in the aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on the evidence could ever stand." *Pedrick*, 229 N.E.2d at 514. The Seventh Circuit followed the state standard while it continued to apply a federal reasonableness standard for new trial motions. *Mercado v. Ahmed & Checker Taxi Co.*, 974 F.2d 863, 866 (7th Cir. 1992); *Cook v. Hoppin*, 783 F.2d 684, 687-88 (7th Cir. 1986); *Huff v. White Motor Corp.*, 609 F.2d 286, 295 (7th Cir. 1979); *Galard v. Johnson*, 504 F.2d 1198, 1200 n.1 (7th Cir. 1974).

In *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963 (7th Cir. 1983), Judge Posner, while affirming a state standard jury sufficiency rule, stated that the Court was "in some tension" because of the dichotomy between this standard and the new trial standard. He stated that the decision "nevertheless can be defended and maybe even reconciled" while noting that past opinions tended to ignore contrary law and criticism. *Id.* at 971. Several cases noted a possible conflict between the similar review contexts but still deferred to a state jury test, finding no need to resolve any inconsistency within the circuit or to reconsider the issue. *Robison v. Lescrenier*, 721 F.2d 1101, 1103 (7th Cir. 1983); *Davlan v. Otis Elevator Co.*, 816 F.2d 287, 289 (7th Cir. 1987) (contrasting state sufficiency test and federal new trial test); *Wassell v. Adams*, 865 F.2d 849, 854 (7th Cir. 1989).

Over the next decade, the Seventh Circuit continued to apply the state test rule without discussion of intervening decisions of this Court which arguably impact the standard of review analysis in diversity actions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Nor did later cases attempt to reconcile these standards. *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1196 (7th Cir. 1992) (separate section applies the federal new trial test without relating to opinion's long discussion of state sufficiency test); *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1181-82 (7th Cir. 1992) (both reviews stated consecutively without noting possible inconsistency). And this was the case even though the use of the state test may have been determinative in a diversity action borrowing state law from a jurisdiction which applies the *scintilla* rule. *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1193-96 (7th Cir. 1992) (applying Wisconsin *any evidence* standard; limited review test appears decisive).

All of this changed in 1994 when the Seventh Circuit adopted a federal standard of review.

> "[A]lthough state law defines the elements of a claim and the burden of persuasion, federal law defines the standard for evaluating the sufficiency of evidence. If reasonable persons could not find that the evidence justifies a decision for a party on each essential element, the court should grant judgment as a matter of law. . . ." *Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330, 335 (7th Cir. 1994).

In the *Mayer* opinion by Judge Easterbrook, a panel of the 7th Circuit abandoned the state rule in favor of a uniform federal reasonableness test to apply to all phases of jury review. The Court decided that consistency with other appellate review situations and the *Erie* policy required this change. *Id.* at 333-351. See, also, *Sokol Crystal Prods. v. DSC Communications,* 15 F.3d 1427, 1431-32 (7th Cir. 1994).

Following *Mayer,* the Seventh Circuit has generally followed a federal sufficiency test for jury review. *Gruca v. Alpha Therapeutic Corp.,* 51 F.3d 638, 642 (7th Cir. 1995); *Desnick v. ABC, Inc.,* 44 F.3d 1345, 1349 (7th Cir. 1995). And yet even now the Seventh Circuit still occasionally follows the state review standard. *Jackson v. Bunge Corp.,* 40 F.3d 239, 242 (7th Cir. 1994); *Suzek v. Sea-Land Corp.,* 89 F.3d 345 (7th Cir. 1996); *Geldermann, Inc. v. Financial Management Consultants, Inc.,* 27 F.3d 307 (7th Cir. 1994); *Hiatt v. Rockwell International,* 26 F.3d 761 (7th Cir. 1994). Without further guidance from this Court, the circuit courts have apparently decided to make this decision on their own. See, *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969) (*en banc*). While this may answer the question for a time, it does not provide the constitutional certainty that should be present on a fundamental issue of trial and appellate review.

SUMMARY

The sufficiency of the evidence test is not substantive in one case and procedural in another. In diversity cases where federal interests are not implicated, a state standard should apply in order to fully implement the state substantive law. Professor Childress has recently stated that "*any minority panel* otherwise now skeptical of a state standard rule need not await further high court direction to the extent these circuits wish to change or cement their review rule in favor of federal law." Steven A. Childress, *Review of Jury Verdicts in Diversity Cases: An Erie Update*, 4 Nat'l Italian Am. Bar Ass'n J. 39, 61 (1996) (emphasis added). Appellants disagree. For the above reasons and those stated in their Petition, Appellants ask this Court to grant a Writ of Certiorari to review this important constitutional question.

Respectfully submitted,

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